UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, RONALD BIENDSEIL, RON BOONE, VERA BOONE, ELVIRA BUMPUS, EVANJELINA CLEEREMAN, SHEILA COCHRAN, LESLIE W. DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD KRESBACH, RICHARD LANGE, GLADYS MANZANET, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, GLORIA ROGERS, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE and RONALD KIND,

Intervenor-Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants.

Civil Action
File No. 11-CV-562

Three-judge panel
28 U.S.C. § 2284

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PLAINTIFFS' MOTION FOR AN EMERGENCY HEARING AND ORDER TO SHOW CAUSE—TO DEFENDANTS TO PROVIDE CORRECT DATA AND EXPLAIN FAILURE TO DISCLOSE—AND FOR HEARING ON DEFENDANTS' PROTECTIVE ORDER MOTION

VOCES DE LA FRONTERA, INC., RAMIRO VARA, OLGA WARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Case No. 11-CV-1011
JPS-DPW-RMD

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, and TIMOTHY VOCKE, and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

Late Friday, the Government Accountability Board ("GAB") issued a seven-page memorandum declaring that "strict compliance" with Acts 43 and 44 "is impossible" because those statutes attributed "census blocks . . . to incorrect municipalities or voting districts." Declaration of Douglas M. Poland ¶ 2, Ex. 1 ("January 13 Memo"). Put "simply," Acts 43 and 44, "which were based on Census data, define the districts using inaccurate municipal boundaries." *Id.* Known to the defendants since at least November 10, 2011, but not disclosed to the plaintiffs or the Court, the self-described "anomalies" in municipal and ward boundaries identified in the GAB's January 13 memorandum directly affect the integrity of the redistricting process and the implementation and validity of the legislation at issue.

The defendants, having been advised in a January 14 letter that plaintiffs would seek court intervention absent adequate explanation, moved for a protective order within an hour of speaking with plaintiffs' counsel about this issue. In both their conversations with plaintiffs' counsel and their brief, the defendants do not acknowledge that these anomalies should have

been *disclosed*, much less produced, in response to discovery requests made by the plaintiffs in *November*. If these data are not relevant, the defendants should have argued that point long ago. Instead, they waited until the plaintiffs finally learned of and raised this issue because it was disclosed in a newspaper article.

As their basis for withholding even the existence of the November 10 memo and the anomalies it identifies, the defendants rely on the legal fiction that districts remain constitutionally apportioned throughout the decade to argue that these anomalies are not relevant. That fiction, which addresses the population shifts that inevitably follow any census, has nothing to do with the anomalies at issue here, which are known errors in the data that GAB is currently attempting to reconcile. These errors resulted, in no small part, from the hasty and misguided process for drafting this legislation, which produced statutes that cannot be fully enforced because they presume that boundaries are where they are not. Documents related to this issue are most certainly relevant to this litigation. They should have been at least identified, if not produced, two months ago.

MOTION

Plaintiffs by their counsel, Godfrey & Kahn, S.C., move the Court to schedule an emergency hearing before the three-judge panel in Milwaukee (with at least the presiding judge in person) as soon as possible and to direct the defendants and their counsel to appear, to testify, and to show cause:

- Describing the "consequential effect" of these anomalies on the constitutional and statutory integrity of Acts 43 and 44, including any increased deviation from population equality;

- Explaining their failure, since at least November 10 and continuing to the present day, to disclose to the Court or to the parties the existence of the problem and the serial documents that attempt to describe it;
- Analyzing the effect of the "anomalies" on the expert reports already exchanged by the parties and on the trial schedule; and
- Explaining why sanctions should not be imposed against the defendants.

GROUNDS

1. This redistricting case under 28 U.S.C. § 2284 and 42 U.S.C. § 1983 is scheduled for trial on February 21, 2012.

2. The parties are in the midst of an expedited discovery schedule. On December 14, 2011, the parties exchanged expert witness reports—and, on January 13, rebuttal reports—that took weeks of document review and data analysis to prepare. Expert depositions are scheduled to begin on January 18 and run through February 3. Those expert reports focused on the composition of the state's eight Congressional districts and its 99 assembly and 33 senate districts. The experts' analyses, for all parties, focused on the reported population data from the 2010 census and the state's enactment of redistricted boundaries based not on ward and local government boundaries, as the law had required, but on census blocks, which the legislature chose to use for the first time in the 2011 redistricting process.

3. The issues raised in the Second Amended Complaint and the defenses to it are data intensive. Those issues include the disenfranchisement of voters in state senate districts; the division of communities of interests and municipalities; the voting age populations of districts with concentrations of Hispanic American and African American citizens under the Voting Rights Act; core population retention; comparative population deviations from precise

population equality; and, the census block procedure employed by the legislature for the first time. The anomalies would have affected the analysis performed by the plaintiffs' expert, Ken Mayer, and, in particular, his analysis of compactness, core district retention, disenfranchisement, population shifts among districts, and potentially even the number of minority voters in assembly districts in Milwaukee.

4. With respect to Congressional districts, population deviations from precise equality are particularly critical. *See Jefferson County Comm'n v. Tennant*, No. 2:11-CV-0989, 2012 U.S. Dist. LEXIS 569 (S.D. W. Va. Jan. 3, 2012) (declaring West Virginia reapportionment plan unconstitutional based on 0.79 percent variance in population of congressional districts). Although the extent of the error rates remains unclear, a shift of even a handful of persons could change the population deviation to unacceptable levels. The Court has before it, in that regard, a Rule 12(c) motion by the Congressional intervenor defendants to dismiss the relevant claims on the assumption that the population deviation is effectively zero. Based on the defendants' own memoranda, that assumption may no longer be valid.

5. As early as November 10, 2011, more than two months ago, the GAB became aware of "new issues . . . that directly impact [GAB's] Redistricting Initiative," as documented in an internal GAB memorandum issued on that date. Poland Decl. ¶ 3, Ex. 3 ("November 10 Memo"). According to GAB, the data set provided to the state, called TIGER, which the legislature used to formulate the Act 43 and 44 districts, "contains substantial inaccuracies with administrative boundaries," like ward, town and city boundaries. *Id.* at 2. "This becomes problematic particularly for municipal boundaries, because many voters can be affected if the Census municipal boundary is 50 meters or more away from its actual location." *Id.* at 2.

6. For example, according to the GAB, Rock County identified approximately 200 addresses (not just individual people) placed in the wrong municipality based on the TIGER data. The "corrections" made by Rock County, however, "directly conflict with census blocks and the specific statutory languages of Acts 43 and 44 . . . ." November 10 Memo at 2. Concludes that GAB memorandum: "This situation is repeated in many other counties, if not all counties." *Id.* at 5.

7. The legislature created Acts 43 and 44, pursuant to a new procedure established through Act 39, "before municipalities had finished creating their local wards . . . ." November 10 Memo at 3. That is, the legislature redistricted the state based on census blocks that did not invariably conform to local government boundaries. That process, the plaintiffs contend, violated state law. *See* Second Amended Complaint (Dkt. 48) ¶¶ 35-42. But its practical consequences only now are becoming clear. "This is problematic . . . because those census blocks do not reflect the correct municipal boundaries," and the results "would place voters on the wrong poll books for each election." November 10 Memo at 3. The memorandum continues: "This manual correction process may also conflict with precise compliance with Acts 39, 43 and 44." *Id.*

8. The November 10 memo describes the effect of the "anomalies" on local governments and voters. It does not reflect or even acknowledge the effect on the statistical analysis integral to any redistricting review—which, by definition, involves comparisons of population and displacement, district by district.

9. The November 10 memo does not want for candor: "The corrected wards and municipal boundaries deviate from the census blocks, therefore using the corrected districts

could be interpreted as violating the statute[s]. However, the statute[s] must be violated in practice in order to give a voter the correct ballot." November 10 Memo at 4.

10. The GAB concludes by recommending that it still must "work with the Legislature" to make "necessary technical corrections to Acts 39, 43 and 44" by referring "to the actual wards that comprise the districts, rather than referring to the census blocks." November 11 Memo at 4.

11. Whatever the impact of these "anomalies" on the municipal clerks and voters, the impact on this litigation—while still to be determined—can only be significant. A determination of how significant can only await testimony by the defendants.

12. In the January 13 memo, GAB director and general counsel Kevin J. Kennedy offered guidance to the state's municipal clerks "to help reduce the consequential impact of the anomalies." January 13 Memo at 1. Once the necessary corrections occur, he wrote, "it is likely that the final districts will not strictly match those prescribed by Acts 43 and 44 because census blocks were attributed to incorrect municipalities or voting districts." *Id.* at 7.

13. The first media accounts of the problem appeared only on January 10, 2012. *See* Poland Decl. ¶ 4, Ex. 4. One newspaper reported that the state's mapping had placed some residents off the coast of Africa. *Id.* ¶ 5, Ex. 5.

14. The failure of the defendants to ever disclose the problem to the plaintiffs and the Court raises equally troubling questions—as a matter of procedure, substance, and the effect on the judicial process.

15. The parties exchanged initial Rule 26(a) disclosures on November 16, 2011—six days after the GAB's November 10 memorandum. The defendants purported to disclose, among other things, all "[d]ocuments in the possession of the GAB with respect to the implementation

of the new redistricting maps." Poland Decl. ¶ 7, Ex. 7 at 4. The defendants further provided that "[a]ll of the documents listed above . . . have been made available for inspection by the other parties at a time and place mutually agreed upon by all parties." *Id.* at 5.

16. On November 21, 2011, the plaintiffs moved to compel the defendants to disclose the identities of individuals described—but not named—in their disclosures. *See* Mot. to Compel (Dkt. 50). The defendants, in response, amended their initial disclosures by adding four names. Poland Decl. ¶ 8, Ex. 8 at 5-6, 10.

17. The Court, in denying the plaintiffs' motion, set out its expectation for discovery: "[T]his Court will not suffer 'sandbagging' by either party. . . . [S]hould the defendants later supply a laundry-list of amendments to initial disclosures as the case proceeds, the Court will closely examine the timeliness of any such disclosures to determine whether they should have been made earlier in the pretrial process. . . . The Court will not tolerate a party 'hiding the ball' until a later stage in the litigation." Nov. 30, 2011 Order (Dkt. 61) at 3-4. The Court continued: "Simply put, to best manage this case, the Court will not hesitate to exercise its discretion under Rule 37 to strike future disclosures or award appropriate monetary sanctions should a party's discovery responses be deemed non-compliant or otherwise withheld in bad faith." *Id.* at 4.

18. In a letter hand-delivered to Assistant Attorney General Maria S. Lazar on November 29, 2011, counsel for the plaintiffs sought to schedule a date for the inspection of the documents described in defendants' initial disclosures. Poland Decl. ¶ 9, Ex. 9; *see supra* ¶ 15.

19. Later that week, counsel conferred by telephone with the defendants' counsel, Patrick Hodan, regarding that request. Memorializing that conversation in a December 5, 2011 letter to Mr. Hodan, plaintiffs' counsel wrote, "Based on our conversation, it is our

understanding that the state does not have any documents available for our inspection at this time. . . ." Poland Decl. ¶ 10, Ex. 10.

20. On November 22, 2011, plaintiffs served on defendants their first set of requests for production of documents. Poland Decl. ¶ 11, Ex. 11. Those requests included the following:

A. "DOCUMENT REQUEST NO. 4: Please produce any and all documents related to retaining the core population of Wisconsin's prior (2002) districts, including but not limited to any data or analyses used by the legislature and/or its various bodies, or those individuals on the legislature's behalf to draw the 2011 redistricting maps enacted as Acts 43 and 44."

B. "DOCUMENT REQUEST NO. 6: Please produce any and all documents related to shifting populations from even to odd state senate districts, including but not limited to any data or analyses, that were used by the legislature and/or its various bodies, or those individuals on the legislature's behalf, to draw the 2011 redistricting maps enacted as Acts 43 and 44."

C. "DOCUMENT REQUEST NO. 12: Please produce any and all documents related to census data from 1970 through 2010, including but not limited to, any documents detailing population growth and changes from 1970 through 2010."

21. The defendants responded to the plaintiffs' discovery requests on December 12, 2011. In response to Document Request Nos. 4, 6, and 12, the defendants stated that the GAB would "produce relevant, non-privileged documents in its possession, custody or control (including documents it obtains from third-parties) that defendants reasonably understand to be responsive" to each request. Poland Decl. ¶ 12, Ex. 12.

22. The defendants produced documents in response to the plaintiffs' discovery requests on December 12, 2011, two days before expert reports were due. Those documents included only a copy of the transcript of the July 13, 2011 joint committee hearing on Acts 43 and 44, three oversized maps, and a "thumb drive" with Legislative Technology Services Bureau census files, the statewide 10 folder and the ward lines. Poland Decl. ¶ 12. The GAB's November 10 memorandum was not among the documents produced. To the plaintiffs' knowledge, the defendants' document production contained no information—nor even a passing reference—regarding the anomalies in the redistricting process addressed at length in the November 10 memorandum.

23. On January 12, 2012, the plaintiffs served a second set of discovery requests on the defendants, which included requests related to the anomalies in the redistricting data recently reported in the news media. Poland Decl. ¶ 13, Ex. 13.

24. In a letter sent on January 14, 2012, counsel for the plaintiffs asked the defendants' counsel to "explain why [they] did not identify or produce the GAB's November 10, 2011 memorandum . . . under Rule 26 and in response to plaintiffs' discovery requests." Poland Decl. ¶ 14, Ex. 14 at 2.

25. Plaintiffs' counsel spoke by telephone with defendants' counsel on January 16 about the discovery issues raised by the anomalies in the redistricting data. In this call, defendants' counsel articulated the defendants' view that the anomalies identified by the GAB are not relevant to this litigation because courts adopt the fiction that the census data are accurate when evaluating redistricting legislation. Defendants' counsel further explained that, absent the plaintiffs' withdrawal of the discovery requests that relate to the anomalies, they would move the Court for a protective order. Plaintiffs' counsel declined their invitation to withdraw the

discovery requests because the parties disagree, so dramatically, as to the relevance of this information.

26. The defendants moved for a protective order within an hour of this telephone call. *See* Defendants' Motion for Protective Order (Dkt. 107). They root their argument in relevance, relying on the "legal fiction" that plans remain constitutionally apportioned all decade long. However, these anomalies are unrelated to the post-census population shifts that are the basis for the legal fiction.

27. The defendants also rely on a presumption of accuracy in census data, *see McNeil v. Springfield Park Dist.*, 851 F.2d 937, 946 (7th Cir. 1988), despite the fact that defendants themselves—the GAB—have already rebutted the presumption by documenting multiple inaccuracies. The defendants cite no authority for their contention that this "presumption" can only be rebutted before the redistricting legislation is passed but, somehow, not after. Indeed, *McNeil* provides that "[p]roof of changed figures must be clear and convincing to override the presumption," *id.*, but never suggests that this can only occur before redistricting legislation is passed. Furthermore, the question here concerns not *changes* in data, but data that were not right in the first place. It is inconceivable that an irrebuttable presumption of validity could apply in such a context—but that is precisely what the defendants are arguing.

28. The problem here is, at the least, one of process. By drawing Acts 43 and 44 not by wards but by census blocks, which are *known* not to accurately track municipal boundaries, the legislature pursued a process prone to error. These are not the inevitable population errors that accompany the census. These are issues with the redistricting statutes themselves, which the GAB has stated must be violated in order to give voters the correct ballot.

29. These problems are of the legislature's own making, created by its decision to fast-track the process before municipalities could draft the wards that are the traditional building blocks of redistricting. Indeed, that is one of the specific claims of the Second Amended Complaint. And, even if the data underlying Acts 43 and 44 are presumed to be accurate, the plaintiffs have the right at least to attempt to rebut that presumption. By failing to disclose the "anomalies" and errors in the data known to the GAB as far back as November 10, the defendants have effectively prevented the plaintiffs from obtaining relevant evidence that would allow them to attempt to rebut any presumption that arguably might apply.

30. Any information in the GAB's possession concerning errors in the redistricting process had to be produced pursuant to Rules 33 and 34 and to Rule 26(a), which mandates the disclosure "of all documents . . . that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(ii).

A. The defendants set out their view of this case in their response to the plaintiffs' motion to compel: "From the defendants' perspective, this case is simply about whether the new district lines comply with Constitutional requirements. It has nothing to do with *why* the legislature adopted those lines." Defs.' Resp. to Mot. to Compel (Dkt. 59) at 3.

B. In light of the defendants' own characterization of their defense, it is inconceivable that errors in the boundaries codified in Acts 43 and 44—errors that the GAB would have to correct to implement those statutes—are not relevant to their defenses. Indeed, this information affects where "the new district lines" will fall and, hence, directly implicates whether or not those lines "comply with Constitutional requirements."

31. The defendants also were obligated to disclose this information in response to the plaintiffs' requests for the production of documents. Any errors in Acts 43 and 44 inevitably would affect the retention of core population and the shifting of populations from even to odd state senate districts, implicating Document Requests Nos. 4 and 6. Furthermore, the November 10, 2011 memorandum is clearly a document "related to census data from 1970 through 2010," as it explained that "the TIGER data from the 2010 census . . . contains substantial inaccuracies with administrative boundaries." November 10 memo at 2.

32. The failure to disclose this information has a context: the continuing efforts by the legislature, notwithstanding three Court orders, to comply fully with the rules of civil procedure. As the Court has recognized, "the Legislature and the actions of its counsel give every appearance of flailing wildly in a desperate attempt to hide from both the Court and the public the true nature of exactly what transpired in the redistricting process. . . . [T]he truth here—regardless of whether the Court ultimately finds the redistricting plan unconstitutional—is extremely important to the public, whose political rights stand significantly affected by the efforts of the Legislature." Jan. 3, 2012 Order (Dkt. 104) at 7.

33. As the Court's January 3 order stated, of paramount importance in this litigation is "the truth" about the makeup of the districts established in Acts 43 and 44. To ensure that the Court can arrive at that truth, "counsel . . . have a continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation." *Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985) (internal quotation marks omitted); *see also Beam v. IPCO Corp.*, 838 F.2d 242, 249 (7th Cir. 1988).

34. Whatever the outcome on the merits, the plaintiffs seek through this action to discover and present to the Court the intent and all of the effects of Acts 43 and 44 so that the

Court can make a fully informed ruling on the plaintiffs' claims. The defendants' deliberate decision to keep from the plaintiffs and the Court relevant information has thwarted that effort. It must be remedied now.

CONCLUSION

For the reasons stated above, the plaintiffs move this Court for an order granting the following relief:

1. Conduct a hearing as soon as possible on both this motion and defendants' protective order motion and order the defendants to explain in person to the Court the anomalies in the redistricting data and the status of the defendants' treatment of the problems with the data;

2. Stay discovery pending the hearing and adjust the trial schedule, if necessary, to enable GAB to correct the data and release a final data set that will allow the experts for all parties to fully consider the corrected data and issue revised or new opinions, as necessary; and,

3. Impose appropriate sanctions on the defendants.

Dated: January 16, 2012.

GODFREY & KAHN, S.C.

By: *s/ Douglas M. Poland*

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